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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 670

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

PHILADELPHIA COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled cause October 28, 1948. (R. 343)

OPINIONS BELOW

The opinion of the Court of Appeals accompanying its judgment of October 28, 1948 (R. 327-342) has not yet been officially reported. The opinion of the Court of Appeals accompanying its order of October 8, 1947 denying a motion to dismiss the petition for review of Philadelphia Company is reported at 164 F. 2d 889. (R. 199-231.) The memorandum of views of the Commission, which accompanied its action of February 28, 1947 (R.

111-131), is reported in S. E. C. Holding Company Act Release No. 7237-A.

JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1948. (R. 343) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254, made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935. The time for filing this petition for a writ of certiorari was extended to and including March 25, 1949 by order of the Chief Justice of the United States, dated January 24, 1949. (R. 349)[1]

QUESTIONS PRESENTED

1. Where the Commission has granted an exemption to a class of subsidiary companies by a rule promulgated by "publication" pursuant to its discretionary power under Section 3(d) of the Public Utility Holding Company Act of 1935, may the Commission thereafter rescind or amend its exemption rule by an exercise of the rule-making process when the approximately 40 subsidiary companies

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[1] In applying to the Chief Justice for an extension of time to file a petition for a writ of certiorari it was stated that negotiations for settlement between the various parties interested in the Pittsburgh Railways reorganization are pending. Settlement negotiations are still pending but have not produced definitive results. While the possibility remains that a settlement may develop, in the Commission's view, whether or not there should be a settlement, consummation of a plan can best be effectuated through exercise of powers of the Commission under Section 11 of the Holding Company Act which the decision below restrains. This is because any plan must deal with guaranties of the solvent Philadelphia Company which are not reached by Chapter X. See *infra*, pp. 9-10. Under the circumstances we cannot regard the

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presently affected by the amendment are all subsidiaries of the same registered holding companies and involved in the same reorganization, or does that fact require the Commission to conduct an adjudicative hearing in which it must offer evidence sufficient to sustain the burden of proof as to the propriety of its proposed action?

2. Does the express statutory provision for direct review only of "an order issued by the Commission" permit review by the court below of the Commission's action in so amending a rule?

STATUTE AND RULES INVOLVED

The action of the Commission complained of arises out of its administration of the Public Utility Holding Company Act of 1935[2] (hereinafter sometimes referred to as "the Holding Company Act" or "the Act") and specifically relates to the action of the Commission dated February 28, 1947, promulgating, to be effective thirty days thereafter, an amendment to Rule U-49(c) under that Act. Of particular importance in this case are Sections 3(d), 11(f), 20(a), 20(c) and Section 24(a). These sections and the Commission's Rule U-49, together with the disputed amendment to paragraph (c) and Rule U-100, are set forth in Appendix hereto.

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pendency of negotiations for settlement as obviating the need for issuance of a writ of certiorari for the reasons set forth herein.

[2] Title 1, 49 Stat. 803 (1935), 15 U.S.C. 79, *et seq.* Pamphlet copies of the Act and of the Commission's rules thereunder are supplied herewith.

STATEMENT

The Public Utility Holding Company Act of 1935 was approved August 26, and registration was made mandatory by December 31, 1935. On November 25, 1935, the Commission issued Holding Company Act Releases Nos. 24 and 25. Release No. 24 published the text of a number of exemption rules granting exemption from various provisions of the Act, including "Rule 3D-5" issued pursuant to Section 3(d) and entitled "Exemption of Certain Non-Utility Subsidiaries." Release No. 25, containing an informal description of the scope of the rules published in Release No. 24, states in part:

> In announcing the rules, the Commission stated that non-utility subsidiaries and the other exempted companies present problems which differ from those presented by gas and electric subsidiaries. Studies will be made of the experience of the industry under these rules, and of the need for their revision.[3]

Rule 3D-5 as so promulgated exempted from most of the provisions of the Act all subsidiaries of registered holding companies which subsidiaries were not either gas or electric utility companies, investment companies, service companies, or holding companies thereof.

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[3] Prior to the Federal Register Act the Commission's practice in the publication of rules was to issue mimeographed releases for distribution to the press and to persons who had indicated their interest in receiving such releases.

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The various exemption rules promulgated by the Commission have been revised from time to time in such a way as to curtail or enlarge the exemptions therein provided. These revisions have hitherto been made by "publication" and without adjudicatory hearings.[4] As part of a general revision of the Commission's rules in 1941 Rule U-3D-5 (Rule 3D-5 had so been renumbered) was repealed, and there was substituted therefor a much narrower exemption for non-utility subsidiaries, designated Rule U-49. The Commission's reasons for thus narrowing the earlier exemption were stated in the Seventh Annual Report of the Commission (1942) pp. 118-119:

> Generally speaking, the administrative difficulties of the regulating non-utility subsidiaries are greater than those involved in the regulation of utility subsidiaries. For that reason the Commission had concluded, in the early days of its administration of the Act, to limit its activities for the time being primarily to the regulation of the registered holding companies and their utility subsidiaries. However, the Commission was required by Section 11 to consider the problem of the retainability

[4] It has been the practice of the Commission to consider informal requests and suggestions of interested persons concerning the exercise of its rule-making powers, and to the extent feasible to offer opportunities for the presentation of oral or written views, generally similar to the procedure prescribed by Section 4(b) of the Administrative Procedure Act in connection with the exercise of rule-making powers where the regulatory statute does not impose a requirement for formal hearing.

of non-utility interest, dependent upon whether or not they are 'reasonably incidental, or economically necessary or appropriate to the operations of' integrated public-utility systems. In the course of its studies in that connection, the Commission reached the conclusion that it was both necessary and feasible to substantially narrow the scope of the exemption heretofore granted to non-utility subsidiaries.

Prior to the amendment now in controversy Rule U-49(c) applied only to operating subsidiaries which (1) were not electric or gas utility companies, and (2) were the subject of proceedings under Chapter X of the Bankruptcy Act in cases to which this Commission was a party. The disputed amendment further limited the exemption by eliminating from its scope subsidiary companies whose securities or obligations were guaranteed or assumed by a registered holding company. Both Rule U-49 and the amendment thereto under dispute were adopted pursuant to Section 3(d) and Sections 20(a) and 20(c) of the Holding Company Act. (*Infra*, pp. 13, 24, 26-27).

Prior to the disputed amendment Rule U-49(c) applied to only two groups of subsidiary companies involved in Chapter X proceedings.[5] One of these consists of the Inland Gas Company and two related companies in reorganization in the United States District Court for the Eastern District of Ken-

[5] The record does not indicate whether Rule U-49(c) ever applied to any other companies in reorganization.

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tucky; these holding company subsidiaries did not have securities or obligations guaranteed by a registered holding company and would not be affected by the proposed amendment but would continue to operate under the exemption. The other group consisting of 43 direct and indirect subsidiaries of Philadelphia Company, including Pittsburgh Railways ("Railways"), in reorganization in the United States District Court for the Western District of Pennsylvania, would no longer be exempt under the amended rule because of the guarantee by Philadelphia Company of securities affected by the reorganization, and thus would be subject to such provisions of the Holding Company Act as are applicable in the absence of the exemption theretofore available under the rule. (R. 127.) The most significant of these provisions is Section 11(f) requiring Commission approval of a reorganization plan prior to its submission to the court.

Philadelphia Company is a registered holding company, and is in turn a subsidiary of Standard Gas and Electric Company and of the latter's parent, Standard Power and Light Corporation, both of which are also registered holding companies. (R. 118.) At the time of the rule amendment Philadelphia Company controlled 15 direct and 40 indirect subsidiaries including Railways and its subsidiaries. Among its subsidiaries are companies providing gas and electric services, which at all times since registration by Philadelphia Company have

been regulated by the Commission.[6] Railways is engaged in operating under leases and operating agreements from both affiliated and non-affiliated companies the street railways system in the City of Pittsburgh. Railways and its 53 underliers (some of which are not statutory subsidiaries of Philadelphia Company) have outstanding a total of 124 different security issues exclusive of equipment trust certificates. Among these securities are those issued by ten of the underliers which have guaranteed returns pursuant to lease and other obligations of Railways and Philadelphia Company. As guarantor of these lease obligations Philadelphia Company is required to make substantial annual payments. (R. 120-121, 123.)

Railways has been in reorganization under the Bankruptcy Act since 1938 and the Commission is a party to the proceeding pursuant to Section 208 of the Bankruptcy Act. A major problem in the reorganization proceeding has been how to simplify the complex relationships between Philadelphia Company, Railways, and the lessor companies. At the time the Commission adopted its disputed rule amendment the reorganization court had held no plan hearings; no plan had been filed in that court since 1942; and in the light of interim litigation it was apparent that a new or substantially amended plan would be required.[7] (R. 121-122.)

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[6] See *Philadelphia Company*, Holding Company Act Release No. 7025 (1946) (R. 118).

[7] In the period since the Commission attempted to amend its rule, a revised plan of reorganization for Pittsburgh Railways Company has been submitted to the District Court for

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Since 1940 the Commission had worked toward effecting compliance with Section 11 of the Act with respect to the Standard Power and Light Corporation and Standard Gas and Electric Company holding company systems, including the Philadelphia Company.[8] Although some progress had been made, there have been many obstacles to compliance, of which the principal one was the fact that the Philadelphia Company system itself did not appear to meet the integration and simplification requirements of Section 11. Just prior to the adoption of the disputed rule amendment the Commission instituted Section 11(b) proceedings with respect to Philadelphia Company.[9] These were referred to by the Commission in adopting the disputed rule amendment (R. 120). The Commission pointed out (R. 123):

> The problem of the guarantees is a very significant one, particularly since very substantial

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the Western District of Pennsylvania. Except for brief introductory testimony no hearings directly relating to the plan have been held although evidence has been received on claims of Philadelphia Company which might be relevant in subsequent plan hearings.

[8] See, *e.g.*, *Standard Power and Light Corp.*, 9 S.E.C. 862 (1941); *Standard Power and Light Corp.*, 11 S.E.C. 689 (1942); *Standard Power and Light Corp.*, — S.E.C. — (1945), Holding Company Act Release No. 5625. A summary description of progress in the Standard's system as of June 30, 1946 may be found in the Twelfth Annual Report of this Commission to Congress (1947), pp. 60-61.

[9] *Philadelphia Company*, Holding Company Act Release No. 7025 (1946). As a result of these proceedings Philadelphia Company has been ordered to dissolve. *Philadelphia Company*, — S.E.C. —, Holding Company Act Release No. 8242 (1948). An appeal from this order by Philadelphia Company and its parent, Standard Gas and Electric Company, is pending.

amounts of money are involved. In the event that the Commission's decision in the Section 11(b) proceedings involving Philadelphia Company directs liquidation of that company, it will, of course, be necessary to deal with the rights of the holders of guaranteed obligations; it may also be necessary to deal with such obligations if the eventual Commission order in such proceedings requires only a simplification of the corporate structure of Philadelphia Company. The treatment which may be accorded such holders in a plan for Philadelphia Company may, of course, be dependent upon the type of reorganization plan which may ultimately become effective for Pittsburgh Railways Company. Conversely, any reorganization of Pittsburgh Railways, in so far as it involves the holders of guaranteed obligations, may be materially affected by the outcome of the Philadelphia Company Section 11(b) proceedings. Under these circumstances it is our opinion that the problems of corporate reorganization of these two companies, whether or not they are considered in the same proceeding, can best be dealt with under the jurisdiction of the same regulatory agency.

In connection with its rule amendment the Commission gave public notice of proposed rule making in compliance with Section 4 of the Administrative Procedure Act, 60 Stat. 238, according interested persons an opportunity to present their views in writing and orally before the Commission. (R. 7-11,

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25-26, 110). Philadelphia Company objected to the amendment of the rule, contending, *inter alia,* that since the rule could only have the effect of withdrawing the exemption from the single group of companies involved in the Pittsburgh Railways reorganization the proceedings looked to the adoption of an "order" rather than a rule, that it was entitled to have proponents of the amendment to the rule assume a burden of proof, and that there should be a factual hearing appropriate for adjudicatory procedures. (R. 35-42, 78-96.) The Commission permitted Philadelphia Company to make an offer of proof (R. 34, 107-110), accepted as facts such portions of the material offered which it did not consider irrelevant, and upon the basis of the record as thus constituted and its experience in the administration of the Act proceeded to adopt and promulgate the amendment without purporting to adduce by testimony or documentary evidence the basis for its administrative experience. (R. 131-134.) The Commission set forth the reasons for its action in a "memorandum of views" which accompanied the rule amendment. (R. 111-131.)

Prior to the date that the Commission's action in amending its rule was to become effective, Philadelphia Company filed a petition in the Court of Appeals for the District of Columbia to review the action of the Commission and moved for an interim stay thereof. (R. 135-151, 151-152.) On October 8, 1947 the Court of Appeals issued an opinion which denied the Commission's motion to dismiss, holding that it had jurisdiction to review by the procedure

applicable to "orders" the amendatory action of the Commission, and granted the requested stay. (R. 199, 228-229, 231.) The Commission filed a petition for a writ of certiorari which was opposed by Philadelphia Company on the grounds, *inter alia,* that the petition for certiorari was premature in that the petition related only to the denial of a motion to dismiss and the granting of a stay by the court below, and because the case was soon to be argued on the merits in that court. This Court denied the petition for certiorari from that order on February 2, 1948. 333 U. S. 828.

On October 28, 1948 the court below held, without passing upon the power of the Commission to adopt its rule, that the Commission had failed to hold a proper adjudicatory hearing on its amendment to Rule U-49(c) by reason of its failure "to assume the burden of proof in respect of the propriety of its proposed action" at an evidentiary hearing. (R. 340.) Judgment was entered reversing the action of the Commission and remanding the case to the Commission for further proceedings in accordance with its opinion. (R. 343.)

REASONS FOR GRANTING THE WRIT

1. The Public Utility Holding Company Act empowers the Securities and Exchange Commission to act in some instances "by rules and regulations" and in others "by order." When the Commission acts by order, adjudicative hearings of a quasi-judicial character are required to be held. But hearings are not a necessary prerequisite to the

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issuance of rules and regulations, since such action is quasi-legislative in nature. See Section 20(c). In such proceedings the Commission holds hearings akin to those held by legislative bodies, such as are now required for rule-making by Section 4 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1003.

The exempting regulation here involved was authorized and adopted pursuant to Section 3(d) of the Holding Company Act, which does not provide for exemption "by order" but that the Commission "may" "by rules and regulations" grant exemptions to subsidiary companies or affiliates "if and to the extent that it deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers and not contrary to the purposes of this title."[10] Section 3(d) by implication and Section 20(a) explicitly authorize the Commission to "amend and rescind" its "rules and regulations." Clearly, the amendment or rescission is as much a legislative act as the original rule, and is no more subject to the requirements of the adjudicative process than the original rule.

Although the amendment to the rule immediately

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[10] By contrast, Sections 3(a) and 3(b) of the Holding Company Act, not applicable in the instant case, provide for exemption of specified classes of companies by rules and regulations on the Commission's own motion, or "by order upon application", and Section 3(c) provides that in the case of a company "exempted by any order issued under" subsections (a) or (b) that the exemption may be revoked "by order" if the Commission "finds that the circumstances which gave rise to the issuance of such order no longer exist."

affected some 40 companies (Pittsburgh Railways and its subsidiaries), it was regarded by the court below as "particular" and adjudicatory because it affected only a single reorganization. Prior to the disputed amendment the exemption covered one other group of companies in reorganization. The obligations of this other group were not guaranteed by a registered holding company while obligations of respondent's subsidiaries were so guaranteed.[11] The basis for classification used in the amendment to the rule turned on this circumstance. It was based on the Commission's judgment, derived from experience with respondent's holding company system, that when such guarantees are extant the purposes of the Act require non-utility subsidiaries to be subject to the Act to substantially the same extent as other subsidiaries of registered holding companies.

Without denying the validity of this basis for classification, or holding that the Commission does not under any circumstances have power to amend or rescind by rule an exemption which has been granted by rule, the court below held that in this instance the Commission could not follow the rule-making procedure. Apparently because the amendment was immediately applicable only to a narrowly circumscribed group of companies, it was held that the Commission could act only by an ad-

[11] The securities so guaranteed are in effect and by the definition contained in Section 2(a)(16) of the Act, securities of the guarantor holding company. (See R. 120-121).

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judicatory order, based on a quasi-judicial hearing with the Commission required to sustain the burden of proof. This particularity of application was thus held to change the entire nature of the procedure which the Commission was required to follow.[12] This plainly is a non-sequitur. The implications of this holding are the more significant because the court below grounded its decision in part upon what it conceived to be the requirements of the Due Process clause of the Fifth Amendment (R. 338, 342).

It is true that one distinction between what is legislative and what is judicial relates to the generality of the coverage of the order in issue. But here the modified rule does apply generally in the future to any company which might be reached by it. Another distinction is that legislative action prescribes a rule for the future, not necessarily based (as is an injunctive order) on a person's conduct in the past. But a general rule for the future does not cease to be legislative even if only a single person or company presents the problem responsible for the rule, or even because, at the time the rule was promulgated, only a single person

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[12] While the court stresses the fact that only a single reorganization was affected, it is not clear whether the invalidity of the Commission's procedure stems from the failure to withdraw exemption from the Inland group of companies. If so, the decision below clearly negates the Commission's power to classify, regardless of reasonableness. If not, and the action is held to be particular because affecting only a limited number of reorganizations, rather than a single one, the decision is all the more sweeping.

or company may be affected by it. Cf. *Daniel* v. *Family Security Insurance Co.*, No. 297, decided February 28, 1949, which upheld a statute general in application but obviously directed at the only concern previously engaged in the forbidden practice of selling "funeral insurance."

There is thus no basis for the court's holding that simply because only one reorganization was affected thereby, the rule withdrawing the exemption is an adjudicative action which must follow the procedural requirements applicable to quasi-judicial action. The decision to that effect, making the procedure governing withdrawal of an exemption different from that governing issuance of other regulations, clearly contravenes the basic statutory scheme, and the careful distinction drawn by Congress in the Public Utility Holding Company Act as well as in the Administrative Procedure Act between legislative and judicial action.

It is of course possible that in some circumstances legislation, or the legislative activity of an administrative agency, may be arbitrary and unconstitutional because directed only at a single individual. But that is by no means necessarily true as to all legislative enactments which are brought about by the conduct of a single person, as the recent South Carolina funeral insurance case demonstrates. Here the court below has not found that the Commission's classification was an arbitrary one. And, we submit, the Commission's

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opinion (R. 111-131) conclusively shows that it is not.

Under the Public Utility Holding Company Act it is clear that the difference between rules and orders was thoroughly understood; the statute on its face shows the care with which Congress differentiated between the two types of administrative actions.[13] Adjudicatory procedure "by order" is prescribed where, for example, the Commission's regulatory jurisdiction depends upon the resolution of an issue of fact as to control or as to whether a particular holding company system is predominately intrastate in character. See Sections 2(a)-(7) and 3(a)(1).[14] Whether or not the Commission should grant or continue an exemption for subsidiary companies under Section 3(d) poses no factual issues, but merely the broad question of policy whether the Commission should exercise the regulatory jurisdiction concededly confided in it. Once the exemption is withdrawn, whether particular transactions by subsidiaries should be author-

[13] A great many provisions specifically require the Commission to act by "order." See e.g. Sections 2(a)7, 2(a)8, 2(b), 3(c), 7(b), 10(d) and 11(b). Sections authorizing the Commission to act "by rules and regulations" include Sections 3(d), 15(i), 17(b) and (c). Sections authorizing the Commission either to act by "order" or "by rules and regulations" include Sections 3(a) and (b), 5(c), 11(e) and (f), 12, 13, 14 and 20(a).

[14] Commission Rule U-100(b), relied upon by the court below (R. 339), indicates that the Commission "may", without amending an exemption rule, exclude a particular company from its scope "by order" after opportunity for hearing. This rule does not purport to, and could not, abdicate the Commission's power to change its rules by the simple process of amendment.

ized or prohibited in the exercise of such regulatory jurisdiction would, of course, be the subject of future adjudicatory hearings.

2. The fact that what is involved is a withdrawal of an exemption leaves even less justification for the court's action. The effect of the amendment was not to single out the Pittsburgh Railways' group of companies for discriminatory treatment as compared to subsidiaries of registered holding companies in general, but to place them in the same class as all other subsidiaries excepting only the Inland group. The statute itself expresses the general policy of Congress that holding companies and their subsidiaries should be controlled in the manner prescribed. Exemptions were to be granted to subsidiary companies only in the discretion of the Commission. But the granting of an exemption does not place upon the Commission the affirmative burden of proving in the future why a company ought to be brought under the Act, as the court below has held here. Exemption is always an exceptional status, and the burden of sustaining it rests upon the claimant. *Schlemmer* v. *Buffalo, Rochester and Pittsburgh Railway Company*, 205 U. S. 1, 10; *Ryan* v. *Carter*, 93 U. S. 78, 83. The Commission should be free to exercise its discretion so as to withdraw an exemption not granted as of right without having to sustain the burden of proving that the Act should apply.[15]

[15] If a person has once established a right to exemption, it might be argued that there is basis for implying a burden

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Indeed, it is difficult for the Commission to know just what it must prove at the type of hearing required by the court below.

Surely the Commission does not have the burden of proving why it was reasonable for Congress to entrust it with power under Section 11(f) to hold plan hearings and to approve, prior to submission to the court, reorganization plans for subsidiaries of registered holding companies. Nor is it apparent why the Commission should be required to prove affirmatively, as a condition prerequisite to exercising this power, that the machinery of Section 11(f) is more likely than that of Chapter X alone to advance the reorganization of the Pittsburgh Railways group of companies.[16]

A possible interpretation of the decision is that the Commission is required, as a sheer matter of procedural ritual, to introduce in evidence the un-

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upon the regulatory agency of showing reasons for revocation. *Cf.* Section 3(c) which specifically contemplates proceeding by order where the Commission revokes an exemption granted by order. This is not the case here, however, where the Commission has merely granted a discretionary exemption by rule without determining any claim of right to exemption. To impose such procedural obstacles to the amendment of rules is to deter liberality in the grant of exemptions on an experimental basis, thus defeating the "flexibility of administration" which was the declared objective of granting the Commission exemptive powers under Section 3(d). See Senate Report No. 621, 74th Cong., 1st Sess., p. 6.

[16] This could involve, at one extreme, recanvassing everything that has thus far occurred in the Pittsburgh reorganization which might be as time-consuming and burdensome as the actual holding of plan hearings, or at the other extreme, a useless proffer of conclusionary opinion testimony concerning the issue of policy confided in the Commission by Congress.

disputed facts recited in its opinion which prompted it to conclude that it was important to the policy of the Holding Company Act to expedite the reorganization of Pittsburgh Railways. This, however, would be both a futile and a time-consuming ceremony, not required, we believe, where the Commission is proceeding in the exercise of avowed rule-making power under a section of the statute which prescribes that it shall act "by rule." The very uncertainty of the requirement imposed upon the Commission holds forth the prospect of future controversy at the administrative level, and on review, before the Commission can take any effective amendatory action.

In actual fact, the procedure which the Commission did follow accorded the Philadelphia Company an opportunity for hearing fully adequate even for adjudicatory purposes if the issue posed by the amendatory action were the ordinary one of whether exemption should be accorded by reason of some special circumstances from otherwise applicable provisions of the Act. In the instant case the Commission gave opportunity for both oral and written argument and received and considered an offer of proof. Despite Philadelphia Company's contention that this procedure did not sufficiently apprise it of the issues which it had to meet, the "Notice of Proposed Rule" (R. 8-9) informed respondent not only of the changes proposed but of the purposes and reasons for the change.

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3. The decision herein sought to be reviewed goes much further than the order as to which this Court denied review by certiorari last term, although both stem from a similar misconception as to the distinction between adjudicative orders and legislative rules. For the court below has now not only held a rule to be a reviewable "order" under Section 24(a), but also that it must rest upon an adjudicative record in which the Commission has the burden of proving why an exemption should be withdrawn. Whether a rule, even one which affects only a particular company, is a reviewable order within the meaning of Section 24(a) nevertheless presents an important question, not only to the Securities and Exchange Commission but also to other administrative agencies.[17]

The decision below perpetuates the error of the court in disregarding the distinction. Since the denial of the Commission's motion to dismiss was an interlocutory order, our previous petition for certiorari may have been denied because the order

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[17] Review provisions similar to Section 24(a) are contained in numerous other acts, *e. g.* Communications Act of 1934, 48 Stat. 1093, sec. 402 (b)-(f), 47 U.S.C. 402 (b)-(f); Securities Act of 1933, 48 Stat. 80, sec. 9 (a), 15 U.S.C. 77i; Trust Indenture Act (1939), 53 Stat. 1175, sec. 322 (a), 15 U.S.C. 77vvv(a); Securities Exchange Act, 48 Stat. 901, sec. 25 (a), 15 U.S.C. 78y (a); Investment Company Act (1940), 54 Stat. 844, sec. 43(a), 15 U.S.C. 80a-42 (a); Investment Advisers Act (1940), 54 Stat. 855, sec. 213 (a), 15 U.S.C. 80b-13(a); Fair Labor Standards Act, 52 Stat. 1065, sec. 10 (a), 49 U.S.C. 210 (a); Natural Gas Act, 52 Stat. 831, sec. 19 (b), 15 U.S.C. 717r (b); and Federal Power Act, 49 Stat. 860, sec. 313 (b), 16 U.S.C. 825l (b).

sought to be reviewed was not at that time final. But that objection to review has now been removed. The court below has now rendered its final decision reversing the Commission, and the Commission is entitled to challenge the ruling as to the court's jurisdiction.

4. The decision below manifests a misconception by the court below of the difference, recognized by Congress, both in the act here involved and in the Administrative Procedure Act, between the adjudication and legislative or rule-making functions of administrative bodies.[18] The court below is the one tribunal which is empowered either by reason of its location at the seat of government or by special statutory provisions to review almost all administrative decisions. It is thus especially important that errors of that court with respect to important principles of constitutional and administrative law be reviewed and corrected. Cf. *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, No. 495, certiorari granted February 28, 1949.

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[18] Although some quasi-legislative action, such as rate regulation, is usually treated as adjudicative, we have no problem here as to where the line must be drawn between the two administrative functions. This case presents the clear cut issue of whether rule-making in its customary sense must meet the requirements governing adjudication.

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CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

MARCH, 1949.

APPENDIX

Applicable provisions of Public Utility Holding Company Act of 1935 (Title I, 49 Stat. 803, 15 U. S. C. 79, et seq.):

Section 3(d):

The Commission may, by rules and regulations, conditionally or unconditionally exempt any specified class or classes of persons from the obligations, duties, or liabilities imposed upon such persons as subsidiary companies or affiliates under any provision or provisions of this title, and may provide within the extent of any such exemption that such specified class or classes of persons shall not be deemed subsidiary companies or affiliates within the meaning of any such provision or provisions, if and to the extent that it deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers and not contrary to the purposes of this title.

Section 11(f):

In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the

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court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

Section 20 (a):

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the costs of all assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated bal-

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ance sheets or profit and loss statements for any companies in the same holding-company system.

Section 20 (c):

The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. For the purpose of its rules, regulations, or orders the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. Orders of the Commission under this title shall be issued only after opportunity for hearing.

Section 24 (a):

Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon

which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification

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as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

General Rules and Regulations under the Public Utility Holding Company Act of 1935:

RULE U-49. CERTAIN EXEMPTIONS GRANTED TO NON-UTILITY SUBSIDIARIES

(*a*) *Companies exempted.*—The exemptions provided by this rule shall apply to any subsidiary of a registered holding company which subsidiary is not—

(1) A holding company,

(2) A public-utility company,

(3) A company engaged in the business of performing services or construction for or selling goods to associate holding or public-utility companies, or

(4) A company controlling, directly or indirectly, any company specified in clauses (1) to (3) above.

(*b*) *Exemption from sections 6 (a) and 12 (c).*—Any such subsidiary company shall be exempt from the provisions of section 6 (a) of the Act with respect to the issuance or sale of any securities to the vendor of supplies or equipment for use in the business of such subsidiary company, and from the provisions of any rule under section 12 (*c*) of the Act with respect to the acquisition, redemption or retirement of any such securities.

(c) *Transactions approved by a reorganization court.*—Any such subsidiary company which is the subject of a proceeding for reorganization in any court of the United States in which proceeding the Commission has filed a notice of appearance pursuant to section 208 of chapter X of the Bankruptcy Act, as amended, or which is a subsidiary within the meaning of section 106 (13) of said chapter X, or of section 2 (a) (8) of the Public Utility Holding Company Act, of any such subsidiary company which is the subject of such a proceeding, shall be exempt from any provision of the Act applicable to the appointment of any trustee for such company or to any transaction entered into with the approval (direct or indirect) of such court: *Provided,* That such transaction does not involve the acquisition of any utility assets or securities of any public-utility or holding company. * * * *Provided further, that this paragraph shall be inapplicable to any subsidiary company which is the subject of reorganization proceedings (or any subsidiary of such subsidiary company within the meaning of Section 106 (13) of said chapter X or of Section 2 (a) (8) of the Public Utility Holding Company Act), where such subsidiary company, or any subsidiary thereof, is the issuer of any securities, or is the obligor on any obligations, which have been guaranteed or assumed by any registered holding company.* * * *

The last provision of the above rule, which is here set forth in italics was added by the action of

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the Commission which petitioner seeks to challenge.

RULE U-100. ORDERS GRANTING OR WITHDRAWING EXEMPTIONS

(a) Orders granting exemption from rules.—Any transaction subject to the requirements of any rule promulgated under the Act may be exempted therefrom by the Commission upon application, or upon its own motion provided an application for approval of such transaction or a declaration with respect thereto is pending, if it appears to the Commission that such requirements as applied to such transaction are not necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) Orders withdrawing exemption.—Any unexecuted transaction which is within the exemption provided in any rule from the requirements of any provision of the Act or of the rules, may nevertheless be subjected thereto by order, after notice and opportunity for hearing, if it appears to the Commission that the withdrawal of such exemption as applied to such transaction would be appropriate in the public interest or the interest of investors or consumers. The Commission may by such notice suspend the applicability of any such exemption to any transaction pending final determination.

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